82-1093

Supreme Court, U.S.
FILED
DEC 29 1982
ALEXANDER L. STEVAS
CLERK

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

LUKE WILLIAM ABLE, JR. doing business as the Criminal Defense Clinic; Able Bail, Defense and Divorce Clinic; and Able Bail and Defense Clinic,

Appellant,

v.

THE STATE OF TEXAS; JACK HEARD; C.R. GAINES; and HARRIS COUNTY,

Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL OF TEXAS

Patricia Small Burroughs
7303 Hillcroft, Suite 53
Houston, Texas 77081
(713) 777-0744

Attorney for Appellant

QUESTIONS PRESENTED ON APPEAL

1. Whether the Sheriff's refusal to continue to honor appellant's bail bonds solely because of his advertising during the long period this case will be pending justifies a temporary order enjoining the refusal until due process is provided.

2. Whether the summary imposition of sanctions by a state's sheriff on an attorney without notice or any adversary proceeding solely because the attorney advertised his privilege granted by the state of executing his client's bail bonds constitutes an improper restraint on free speech protected by the First Amendment and a denial of the due process and equal protection of the law guaranteed by the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

TABLE OF CONTENTS

PAGE

Questions presented on Appeal.....i

Table of Contents.....ii

Appendices (indexed).....iii

Table of Authorities.....iv

Opinions Below.....2

Statement of Jurisdiction.....2

Constitutional Provisions and Statutes involved.....8

First and Fifth Amendments.....8

Sixth and Fourteenth Amendments....9

Bail Bond Act.....9

Statement of the Case.....12

Reasons Why the Questions Presented Require Plenary Consideration for their Resolution.....20

I. The trial court abused its discretion by denying appellant a temporary injunction.....20

II. The Bail Bond Act, as applied to appellant, violates appellant's established First Amendment rights and prevents Informed Decisionmaking by Consumers.....26

PAGE

III. The Bail Bond Act is Unconstitutionally vague.....32

IV. The Bail Bond Act fails to Provide Equal Protection Under the Law.....35

V. The Bail Bond Act fails to Provide Procedural Due Process for attorneys such as the Appellant.....36

a. First Amendment.....36

b. Fourteenth Amendment.....40

Conclusion.....41

Appendices

Appendix A- Judgment of the Court of Appeals filed February 25, 1982.....A-1

Appendix B-Order of the District Court Denying Temporary Injunction.....B-1

Appendix C-Order of the First Court of Appeals overruling Motion for Rehearing.....C-1

Order of the Supreme Court of Texas dismissing application for writ of error for want of jurisdiction.....C-3

PAGE

Order of the Supreme Court of Texas overruling motion for rehearing.....C-4

Appendix D-The Bail Bond Act, Tex.Rev.Civ.Stats.Ann., Article 2372p-3-as amended through the 1979 session of the Texas Legislature.....D-1

Appendix E-Notice of Appeal to the Supreme Court of the United States filed November 2, 1982.....E-1

Appendix F-Letter from C.R. Gaines, Harris County Sheriff's Department, to Luke W. Able, Jr. Plaintiff's Exhibit 1.....F-1

Letter from John B. Holmes, Jr. , Harris County District Attorney, to C.R. Gaines Defendant's Exhibit 1.....F-4

Appendix G-Excerpts from Plaintiff's request for additional or amended findings of fact and conclusions of law to trial court showing raising of constitutional issues.....G-1

TABLE OF AUTHORITIES

Table of Cases

Bates v. State Bar of Arizona, 433

PAGES

U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810(1977).....28,29, 30

Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).....34

Central Hudson Gas v. Public Service Com'n., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).....24,28,29, 31

City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).....35,36

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).....4,6

De La Garza v. State, 579 S.W.2d 220(Tex.Crim.App., EN BANC, 1979).....33

Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).....22,37

Goldburg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).....41

Grayned v. Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).....32,34

Market S.R. Co. v. Railroad Com. of Calif., 324 U.S.

PAGES

548, 65 S.Ct. 770,
89 L.Ed. 1171 (1945).....3

Matter of R__M. J_____, ___ U.S.
____, 102 S.Ct. 929, 71 L.Ed.2d
64 (1982).....27

Mt. Healthy City School Dist. v.
Doyle, 429 U.S. 274, 97 S.Ct.
568, 50 L.Ed.2d 471 (1977).....40

National Socialist Party of
America v. Village of Skokie,
432 U.S. 43, 97 S.Ct. 2205,
53 L.Ed.2d 96 (1977).....4,5

New York v. Cathedral Academy,
434 U.S. 125, 98 S.Ct. 340,
54 L.Ed.2d 346 (1977).....4,6

Org'n. for a Better Austin v.
Keefe, 402 U.S. 415, 91 S.Ct.
1575, 29 L.Ed.2d 1 (1971).....4,7

Phoenix Mutual Life v. Ins. Dept.
of New York, 500 F.Supp. 2
(U.S.D.C.-S.D.N.Y., 1980).....38

Shuttlesworth v. Birmingham,
394 U.S. 147, 89 S.Ct. 935,
22 L.Ed.2d 162
(1969).....23,39

Space Age Products v. Gilliam,
488 F.Supp. 775(U.S.D.C.,
D-Deleware, 1980).....38

Speiser v. Randall, 357 U.S.
513, 78 S.Ct. 1332,

PAGES

2 L.Ed.2d. 1460 (1958).....31,37,39

U.S. Postal Service v. Athena Products, 654 F.2d 362 (U.S. Appeals, 5th Circuit, Unit B, 1981, cert. den. ___ U.S. ___, 102 S.Ct. 1768).....37

Statutes

Bail Bond Act
Tex.Rev.Civ.Stats.Ann.
Article 2372p-3 .....2, 9-12, 13
-15, 18, 23
28,32,33,34
35,39

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

LUKE WILLIAM ABLE, JR. doing business as the Criminal Defense Clinic; Able Bail, Defense, and Divorce Clinic; and Able Bail and Defense Clinic,

Appellant,

v.

THE STATE OF TEXAS; JACK HEARD; C.R. GAINES; and HARRIS COUNTY,

Appellees.

JURISDICTIONAL STATEMENT
ON APPEAL FROM THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Luke William Able, Jr., by his attorney respectfully prays that the Court review the judgment of the Court of Appeals for the First Supreme Judicial District of Texas entered on February 25, 1982.

OPINIONS BELOW

The Court of Appeals for the First Supreme Judicial District of Texas affirmed the denial of a temporary injunction by the District Court of Harris County, Texas, 11th Judicial District, in an unpublished opinion filed February 25, 1982. No other opinions have been written in this matter.

STATEMENT OF JURISDICTION

Pursuant to 42 U.S.C. §1983, appellant sued in state court for a judgment that sections 15 (d) and 4 of Article 2372p-3 of the Texas Revised Civil Statutes Annotated (hereinafter called either the Bail Bond Act or the Act) are unconstitutional after his statutory privilege to execute bail bonds for his clients was summarily terminated by the Harris County Sheriff's Department because the appellant advertised bail bond services. Appellant further sought a temporary injunction to permit him to

continue executing bail bonds for his clients pending a trial or a conviction, a permanent injunction, damages, and attorney fees. After the district court received evidence and denied the temporary injunction, an appeal was taken.

The judgment and opinion of the Court of Appeals for the First Supreme Judicial District of Texas (hereinafter referred to as the Court of Appeals) sought to be reviewed was dated and filed February 25, 1982. A timely motion for rehearing was overruled by the Court of Appeals on April 22, 1982. A timely application for writ of error to the Supreme Court of Texas was dismissed for want of jurisdiction on July 21, 1982 and a timely motion for rehearing of that dismissal was overruled on October 6, 1982. The judgment of the Court of Appeals became final for purposes of appeal when rehearing was denied on October 6, 1982. Market S.R. Co. v. Railroad Com. of California, 324 U.S. 548,

65 S.Ct. 770, 89 L.Ed. 1171 (1945) reh den 324 U.S. 890, 65 S.Ct. 1020, 89 L.Ed. 1438. The Notice of Appeal to the Supreme Court of the United States was filed in the Court of Appeals on November 2, 1982. It was also filed in the Supreme Court of Texas on November 4, 1982.

The Supreme Court of the United States has jurisdiction under 28 U.S.C. §1257(2) to review this case. This case is final for purposes of Supreme Court review pursuant to the Court's decisions in New York v. Cathedral Academy, 434 U.S. 125, 128 n.4, 98 S.Ct 340, 343 n.4, 54 L.Ed.2d 346 (1977), National Socialist Party of America v. Village of Skokie, 432 U.S. 43-44, 97 S.Ct. 2205-2206, 53 L.Ed.2d 96 (1977), Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 478-480, 95 S.Ct. 1029, 1037-1038, 43 L.Ed.2d 328 (1975) and Organization for a Better Austin v. Keefe, 402 U.S. 415, 418 n.1, 91 S.Ct. 1575, 29 L.Ed.2d 1, 5 n.1 (1971).

The contention that the denial of the temporary injunction will deprive appellant of substantive and procedural First and Fourteenth Amendment rights during the pendency of this case is "separable from, and collateral to" the merits of whether the advertising is protected speech. The decision of the Court of Appeals of Texas is final on this separable issue and the Supreme Court of the United States has jurisdiction to review said court's decision in accordance with 28 U.S.C. §1257. National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 44, 97 S.Ct. 2205, 2206, 53 L.Ed.2d 96 (1977).

The Court of Appeals of Texas also found the evidence did not show any violation of appellant's "free speech rights". Since there is only one standard for making such a decision, the same

standard will be applied at the trial on the merits. It is highly unlikely that the appellant will produce better evidence that the sanctions are solely because of his advertising than the two letters from the appellees already considered in the courts below which admit this fact. Further proceedings cannot remove or affect this threshold federal constitutional issue. New York v. Cathedral Academy, 434 U.S. 124, at 128 n.4, 98 S.Ct. 340, at 343 n.4, 54 L.Ed.2d 346 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, at 478-480, 95 S.Ct. 1029, at 1037-1038, 43 L.Ed.2d 328 (1975).

This summary refusal to honor bail bonds on which appellant appears as a surety solely because of his advertising has been continuing for almost two years. Under these circumstances the Supreme

Court of the United States has jurisdiction by reason of 28 U.S.C. §1257 to review all these constitutional issues involving "free speech" which the state court of appeals decided. Organization for a Better Austin Keefe, 402 U.S. 415, at 418 n.1, 91 S.Ct. 1575, 29 L.Ed.2d. 1, at 5 n.1 (1971).

Extreme economic damage to the appellant is continuing as a direct result of sanctions applied without procedural due process solely because of speech-related conduct.

It will take approximately five years for this case to be reached for trial on the crowded docket of the civil district courts for Harris County, Texas.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution - First Amendment.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution - Fifth Amendment.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. United States Constitution-Sixth Amendment.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

4. United States Constitution-Fourteenth Amendment, Section 1.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. The Bail Bond Act, Texas Revised

Civil Statutes Annotated, Article 2372p-3 (as enacted in 1973, and amended in 1979.) This Act was amended in 1981, however, the 1981 amendments are not involved in this case. The entire Act is set forth in Appendix D.

> Section 2. In this Act;
> ....
> (3) "Bondsman" means any person who for hire or for any compensation deposits any cash or bonds or other securities, or executes as surety any bond for other persons, as many as five times in any 12-month period.
>
> Section 3.
> ....
> (b) Persons who are actually engaged in the practice of law and who are members of the State Bar of Texas who personally execute bail bonds or act as sureties for persons they actually represent in criminal cases may execute bail bonds without being licensed under this Act, but they are prohibited from engaging in the practices made the basis for revocation of license under this Act, and, if found guilty of violating the terms of this Act, may not qualify thereafter under the exception

provided in this subsection.

(c) The provisions of this Act do not apply to the execution of bail bonds in counties having a population of less than 110,000 according to the last preceding federal census.

....

Section 4.

A sheriff may examine under oath any proposed bondsman, or an officer or attorney of any company proposing to execute a bond, as to the indemnity, if any, deposited or otherwise provided directly or indirectly against loss by reason of the bond, and may refuse to accept the bond if, in the exercise of his discretion, he is satisfied that the security is insufficient, any portion of the security has been feloniously obtained, or the provisions of this Act have been violated.

....

Section 15.

....

(d) No person may advertise as a bondsman who does not hold a valid license under this Act. Provided, however, any second or subsequent violation shall be punishable as provided by Subsection (g) of this section.

(e) Any person who violates a provision of this section commits a misdemeanor punishable by a fine of not more than $500.

(g) Any person who violates subsection (f) of this section shall be guilty of a misdemeanor punishable by a fine of not more than $1000. or confinement in the county jail for not more than one year or both.

STATEMENT OF THE CASE

Appellant, Luke William Able, Jr. is an attorney licensed to practice law in the State of Texas. Prior to the events leading to this case, his practice consisted primarily of criminal defense work and was conducted under several different "clinic" names. In the course of his law practice, appellant routinely executed bail bonds for his clients as authorized by §3(b) of the Bail Bond Act. Appellant advertised the fact that he executed bail bonds in the yellow pages of various telephone books in the greater Houston area under the headings "Attorneys" and "Bonds-Bail".

On or about February 12, 1981, appellee

C.R. Gaines, a Harris County deputy sheriff, questioned the appellant's advertising. Appellant maintained he was acting lawfully. Appellee Gaines requested a formal opinion from the Harris County District Attorney's Office.

On March 3, 1981, in a written opinion admitted below, the district attorney concluded that any advertising under the heading "Bonds-Bail" in a telephone book's yellow pages constituted the misdemeanor offense of advertising "as a bondsman" in violation of §15 (d) of the Act. The district attorney also concluded that it was lawful for an attorney to advertise his ability to execute bail bonds in the same telephone directory under the heading "Attorneys". Section 15 (d) does not contain any restrictions about the place or form of advertising in its text. It was enacted in 1973 at a time when all advertising by attorneys was prohibited.

Appellee Gaines then wrote appellant a letter which was admitted below. He quoted the district attorney's conclusion that section 4 of the Bail Bond Act gave the sheriff the discretion to refuse to permit an attorney to execute his client's bail bonds if the sheriff was satisfied the attorney was violating the Act by advertising as a bondsman. This letter informed appellant he would no longer be permitted to execute bail bonds in Harris County under the Act's attorney exception. The Harris County Sheriff's Department has refused to allow appellant to execute his client's bail bonds, and has also refused to certify the adequacy of appellant's security to other counties, thereby effectively destroying appellant's small bail bond business in neighboring counties not subject to the Bail Bond Act.

Appellant brought this action in the District Court for Harris County, Texas,

11th Judicial District, pursuant to 42 U.S.C. §1983, seeking relief which included temporary and permanent injunctions permitting him to execute bail bonds for his clients; damages; and a declaratory judgment that the relevant sections of the Act are void and unconstitutional. Appellant's petition asserted his First Amendment right to advertise as well as his rights to procedural due process, a trial using criminal procedure, and equal protection guaranteed by the United States Constitution. The vagueness of §15 (d) of the Act was made another basis for relief in the petition.

The trial court failed to address the constitutional issues. It found the appellant had not presented evidence of a probable right to continue to act as a surety on bail bonds under the presumedly valid Bail Bond Act, and, therefore, temporary relief was denied.

On appeal to the Court of Appeals

for the First Supreme Judicial District of Texas, appellant reasserted his constitutional rights. His case in the Court of Appeals included the following arguments:

1. That TRUTHFUL ADVERTISEMENTS of a service are protected by the First Amendment;

2. That the state's conduct was a PRIOR RESTRAINT ON SPEECH which lacked the procedural safeguards required by the First Amendment;

3. That §15 (d) was VOID FOR VAGUENESS under the United States Constitution;

4. That summary punishment for a crime violated appellant's right to TRIAL BY JURY and other rights constitutionally guaranteed each citizen of the United States whom the state wishes to punish for an alleged crime;

5. That allowing a sheriff to make judicial determinations violated the SEPARATION OF POWERS principle which is a foundation of constitutional law and Anglo-

American jurisprudence;

6. That the Bail Bond Act failed to provide PROCEDURAL DUE PROCESS and EQUAL PROTECTION to attorneys;

7. That the Bail Bond Act was constitutional only if the Court of Appeals read section 3(b) as requiring that an attorney be convicted of a violation of the Act before sanctions could be applied; and

8. That the trial court abused its discretion.

Basing its decision on the presumed validity of the Bail Bond Act, the Court of Appeals affirmed the trial court's denial of the temporary injunction, stating in its opinion that appellant had not established a probable right to prevail at the trial on the merits. The Court of Appeals concluded the appellant had not "raised" or "presented" evidence of "any violation of his free speech rights" in spite of the undisputed evidence in the record both,

(a) that the dispute was entirely over advertising, and

(b) that a harsh sanction had been imposed without any notice, adversary proceeding, hearing, or any sort of procedural safeguards solely because of advertising.

The Court of Appeals tried to find a knowing and voluntary waiver by appellant of a decision of the constitutional issues. In his opening statement, appellant was starting to tell the trial court that if he construed §3(b) of the Act as requiring that an attorney be duly convicted of a violation of the Act before his §3(b) exception to the license requirements of the Act could be revoked, then, there was no need to decide any of the complex constitutional issues. The trial court stopped the opening statement, so appellant was never able to state why decision of the constitutional issues might not be required.

A waiver of the constitutional questions involved was definitely not intended by the appellant.

At the conclusion of the trial testimony appellant made a vigorous argument that the Act was unconstitutional unless it was read as requiring that an attorney be convicted before his exemption could be revoked. Appellant argued all the points raised in the pleadings. Unfortunately, the court reporter did not record anything after the evidence was closed.

Following the trial and entry of the order denying relief, appellant made a written request for findings of fact and conclusions of law. These requests included requests that the trial court find appellant's pleaded constitutional rights under the First and Fourteenth Amendments to the United States Constitution had been violated. The requested findings also included a finding that appellant's right to a trial

by jury and the other constitutional rights enjoyed by criminal defendants generally in the United States had been violated. The trial court signed an order denying these requested findings and conclusions.

The effect of the Court of Appeals' decision was a denial of all the relief requested in appellant's petition. Appellant's constitutional rights have been seriously violated and these violations were not vindicated in the courts below. Appellant continues to suffer extreme economic damage as a result.

REASONS WHY THE QUESTIONS PRESENTED REQUIRE PLENARY CONSIDERATION FOR THEIR RESOLUTION

I. The Trial Court Abused Its Discretion By Denying Appellant A Temporary Injunction.

In this case appellant's statutory privilege to execute bail bonds under the Bail Bond Act was terminated without any

notice or adversary hearing simply by the sheriff's refusal to honor any further bail bonds where appellant appeared as a surety. The two letters in evidence clearly show this action was taken by the sheriff because of appellant's advertising. This advertising became useless after the sheriff summarily terminated appellant's ability to provide bail bonds to his clients. It was made useless because appellant could no longer provide the service he advertised.

The sheriff's refusal to honor any further bail bonds from appellant is just as much a restraint on appellant's speech as a court order commanding appellant not to advertise would be. It restrains the advertisements by rendering them useless, thereby chilling the exercise of a First Amendment freedom without any procedural safeguards or judicial proceedings at all.

The Court of Appeals held that no procedural safeguards whatsoever were

required and that the sheriff had complete discretion to stop honoring appellant's bonds due to his advertising.

The sheriff's action in refusing to honor appellant's bail bonds, which has been sanctioned by the lower court, will deprive appellant of the lawful exercise of his First Amendment free speech rights during the five or so years this case will take to be reached for trial. This action further amounts to abridgement by the state of appellant's First Amendment rights without due process. Restraints of this type on speech require strict procedural safeguards. Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

The appellant has been actively seeking to exercise his constitutional rights in a criminal prosecution which he has tried to get the state to institute. Appellant

also prayed the temporary injunction be ended by its own terms if he is convicted of a violation of §15 (d) in a state criminal case.

The record clearly shows appellant is suffering severe economic hardship as a result of not being allowed to execute bail bonds for his clients because of his advertising.

Appellant had a constitutional right simply to ignore §15 (d) of the Act unless he was convicted of violating it. Shuttlesworth v. City of Birmingham, 394 U.S. 147, at 151 and 160-163, 89 S.Ct. 935, 22 L.Ed2d 162, at 167 and 172-174 (1969). The sheriff's summary termination of the appellant's privilege ended any prospect of just ignoring §15(d).

For many years prior to 1981 your appellant had been routinely executing his client's bail bonds with the approval of the sheriff and without any problems. None of

your appellant's clients ever forfeited their bail bonds. Since appellant would post a bond each time he secured release of a client with his bail bonds, there was no possibility of any prejudice to the state by granting the requested temporary injunction.

If the trial court did have discretion to deny the temporary order sought, it was an abuse of that discretion to deny it in this case. The probability that appellant will prevail at trial is great. Absolute prohibitions on advertising of services are unconstitutional. Central Hudson Gas v. Public Service Com'n., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

The Court of Appeals correctly held that any denial of a constitutional right raises a presumption of irreparable injury which entitles a plaintiff to a temporary injunction as a matter of law. The Court of Appeals correctly noted that the trial court had no discretion to deny a temporary

injunction if a violation of a First Amendment right was shown by non-conflicting evidence.

The Court of Appeals was not correct in holding that there had been no evidence presented of a violation of appellant's free speech rights. The letters from the sheriff and the district attorney which were admitted in the courts below constitute non-conflicting evidence of violations of appellant's First Amendment rights. Since this undisputed evidence of gross violations of appellant's First Amendment rights was admitted below, it was an abuse of discretion to deny the temporary injunction sought by appellant.

If this action under 42 U.S.C. §1983 had been brought in a federal court where the same standard of a probable right to prevail on the merits and irreparable injury applies, it would have been an abuse of discretion to deny relief for many

reasons including the following:

1. There are no pending or expected state proceedings which may be disrupted by the temporary order;

2. Appellant is being seriously injured by the denial of substantive and procedural rights conferred by the First, Fifth, Sixth and Fourteenth Amendments;

3. There is no possibility of injury to the state by the granting of the temporary injunction.

It is clear that appellant was entitled to a temporary injunction enabling him to continue executing bail bonds for his clients and that the trial court abused its discretion in denying the temporary injunction. The serious First and Fourteenth Amendment rights at stake in this case require plenary consideration of these issues.

II. The Bail Bond Act, As Applied To Appellant, Violates Appellant's Established First Amendment Rights

And Prevents Informed Decision-making By Consumers

All Texas attorneys are permitted by the Bail Bond Act to execute bail bonds for their clients provided they post security satisfactory to the sheriff of the county where they reside. The Bail Bond Act was enacted in 1973, when lawyers were not permitted to advertise under any circumstances in Texas.

Truthful advertising related to lawful activities is entitled to the protection of the First Amendment. Matter of R M. J , ___ U.S. ___, 102 S.Ct. 929, 937, 71 L.Ed2d 64 (1982). Since attorneys may lawfully execute bail bonds, their advertisements of this ability are protected as long as they are truthful.

All that appellant advertised was his ability to provide bail bonds. The district attorney admits that attorneys have a right to advertise their ability to

execute bail bonds. He also says it is lawful for attorneys so to advertise under the heading "Attorneys" in the yellow pages, but unlawful for an attorney to place the identical advertisement under the heading "Bonds-Bail" in the same yellow pages.

Section 15 (d) of the Bail Bond Act prohibits all advertising "as a bondsman" by non-licensed persons. It has no special restrictions as to the place or form of the advertising. This is the section the state claims appellant violated.

Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. Central Hudson Gas v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, at 2349, 65 L.Ed.2d 341 (1980); Bates v. State Bar of Arizona, 433 U.S. 350, at 374, 97 S.Ct. 2691, at 2704, 53 L.Ed.2d 810 (1977).

Appellant had no duty to state he was an attorney to advertise his ability to execute bail bonds. It appears to be the state's contention that since appellant's advertising did not disclose all the limitations on his ability to execute bail bonds, the advertising was not protected speech. This position is contrary to the Central Hudson Gas and Bates cases.

Now that the right to publish truthful advertisements of the services one offers has been extended to attorneys, the state has absolutely no interest at all in prohibiting attorneys from informing potential clients reading the yellow pages that they have posted sufficient security to execute clients' bail bonds.

It is common knowledge that many people look under the heading "Bonds-Bail" instead of the heading "Attorneys" when they first begin to arrange pre-trial release. It is at this critical point in the

criminal process when the purchaser of services needs to be informed of the potential savings which may be realized by retaining an attorney who has posted the required security which allows the attorney to be the bail bond surety.

The basic issue here is the FREE FLOW OF COMMERCIAL INFORMATION to the public from under the heading "Bonds-Bail" in the telephone book yellow pages. The public has a right to receive this information and to become sufficiently informed to make a reasonably intelligent choice between the alternatives of retaining a bondsman only or retaining an attorney for the entire criminal case who will also execute the bail bond. The fact that the entire cost of the attorney's services for the entire case is often not much greater than the bondsman's fee alone should be part of this flow of commercial information. Bates v. State Bar of Arizona, 433 U.S. 350, 364, 97 S.Ct. 2691,

2699, 53 L.Ed.2d 810 (1977).

The state made no attempt whatsoever in the courts below to meet any of the constitutional requirements it was required to show to restrain appellant's advertising. See Central Hudson Gas v. Public Service Commission, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). The state is required to meet the same burden of proof in this case in spite of the fact that here the sanction for speech is revocation of a statutory exemption instead of a fine or an injunction. Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). There does not appear to be any state interest to be furthered by suppression of the attorney exception to the Bail Bond Act. Section 15 (d), which purports to prohibit advertising is presumedly unconstitutional.

The great interest of the public in the free flow of commercial information and the

clear denial of First Amendment rights to appellant justify plenary consideration of this case.

III. The Bail Bond Act Is Unconstitutionally Vague

Section 15 (d) of the Bail Bond Act upon which the state seeks to justify its actions is entirely too vague to allow anyone to guess it would restrict the part of the yellow pages in which an attorney could advertise. The district attorney in effect added a restriction to the statute. This adding of text to laws by district attorneys is prohibited by the First Amendment when speech-related conduct is involved. It would violate the Fourteenth Amendment's general requirements for due process if speech was not involved. See Grayned v. Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222, 227-228 (1972).

To compound the vagueness the Bail Bond

Act fails to provide for the propensity of telephone books to find their way across county lines to areas where the Bail Bond Act does not apply. According to Section 3 (c) of the Act, it applies only to counties with less than 110,000 inhabitants. Texas courts strictly enforce this limitation. See De La Garza v. State, 579 S.W.2d 220 (Tex.Crim.App., EN BANC, 1979), which discussed the other types of conduct prohibited by § 15 of the Act. The De La Garza case did not mention advertising.

Section 15 (d) of the Act, as interpreted by the Harris County Sheriff and District Attorney, with court approval to date, effectively prohibits advertising in counties which are not supposed to be subject to the Act by penalizing anyone whose advertising aimed at a non-regulated county finds its way into a regulated county. Section 15 (d) tends to have a chilling effect on lawful advertising in the non-regulated county and

tends to force advertisers to forego any advertising in the non-regulated market if they lack the license in the regulated neighboring county.

There is no way to steer a course between the lawful and purportedly unlawful conduct within the literal scope of § 15 (d) unless one omits all advertising in any telephone book which might someday find its way into the regulated county. This makes § 15 (d) unconstitutionally vague. See Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222, 227-228 (1972).

It is settled that the free flow of commercial information about services lawfully available in other jurisdictions cannot be restrained. C.F. Bigelow v. Virginia, 421 U.S. 809, 823-825, 95 S.Ct. 2222, 2233-2235, 44 L.Ed.2d 600 (1975).

The weighty interest of the public in the free flow of information concerning

services available in neighboring counties and the clear denial of First and Fourteenth Amendment freedoms to the appellant justify plenary consideration of this case.

IV. The Bail Bond Act Fails To Provide Equal Protection Under The Law

The Bail Bond Act provides extensive procedural safeguards for any licensed bail bondsman whose license the state seeks to revoke. The Court of Appeals has construed the Act as providing no procedural safeguards whatsoever to attorneys. The provision of fundamental procedural due process for one class but not another, makes the Bail Bond Act violative of the constitutional requirement that equal protection of the law be granted to all classes of citizens. Furthermore, there is no possible state interest in suppression of attorneys' advertising of their ability to execute bail bonds. See City of New

Orleans v. Dukes, 427 U.S. 297, 303-304, 96 S.Ct. 2513, 2516-2517, 49 L.Ed.2d 511 (1976).

Plenary consideration of this case is justified by this clear denial of equal protection of the law which violates the Fourteenth Amendment of the United States Constitution.

V. The Bail Bond Act Fails To Provide Procedural Due Process For Attorneys Such As Appellant

a. First Amendment

At the hearing on appellant's application for a temporary injunction, the state did not try to prove it had enacted the procedural safeguards which the First Amendment requires. All the appellant proved was that his statutory exemption from the Bail Bond Act had been summarily terminated because of his speech-related conduct. It is settled law that any direct or indirect penalization for speech-related conduct must be accompanied by the procedural safeguards required by the

Constitution of the United States. Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). In Speiser it was held that revocation of a statutory exemption because of speech requires the state to have the burden of proof. The courts below gave appellant this burden.

A leading case on this strict procedural standard which is mandated by the First Amendment is Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Decisions of the lower federal courts have applied these safeguards to both direct and indirect restraints on commercial speech, e.g. United States Postal Service v. Athena Products, 654 F.2d 362, at 365 and 367-369 (U.S. Appeals, 5th Circuit, Unit B, 1981) U.S. cert.den. 102 S.Ct. 1768 (1982). The Athena Products case held that indirectly rendering Athena's advertising for mail orders useless by stopping delivery of part of its mail was a restraint on speech which required

the First Amendment's procedural safeguards.

See also Space Age Products v. Gilliam, 488 F.Supp. 775, 782-785 (U.S.D.C.-D. Delaware, 1980) and Phoenix Mutual Life v. Insurance Department of New York, 500 F.Supp. 2, 6-8 (U.S.D.C.-S.D.N.Y., 1980). Both of these cases dealt with these procedural safeguards and commercial speech.

It is completely undisputed that there were no procedural safeguards whatsoever present in this case. This restraint on appellant's protected commercial speech which was effected prior to and completely without any notice or an adversary hearing of any sort requires plenary consideration because it is clearly a gross violation of the protection accorded by the First Amendment.

Appellant had a vested constitutional right to ignore the requirement, if any existed, that he obtain a license before he could advertise his ability to provide bail

bonds. His right to ignore the requirement arose because the requirement was unconstitutional and the license scheme did not provide a remedy or method to challenge the license requirement. Shuttlesworth v. City of Birmingham, 394 U.S. 147, at 151 and 160-163, 89 S.Ct. 935, 22 L.Ed.2d 162, at 167 and 172-174 (1969).

Appellant intended to challenge the constitutionality of § 15 (d) of the Act if he was prosecuted for "advertising as a bondsman". The district attorney and sheriff noticed this possibility and avoided the criminal court and the due process required by the United States Constitution. They have punished the appellant for a "speech" crime without going to all the trouble to convict him or give him a chance to defend. This lawsuit is certainly no substitute for a proceeding wherein the state assumes all the burdens of proof and provides for a speedy decision. Speiser v. Randall, 357 U.S. 513,

78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

Even if the Court of Appeals is correct in its opinion that the sheriff could terminate the appellant's privilege of executing his client's bail bonds for the reasons listed in § 4 of the Act, the First Amendment would still entitle the appellant to relief. The uncontested evidence shows the privilege of executing bail bonds is being denied the appellant solely because of his advertising.

Even if the state may terminate a privilege for any reason or for no reason, it is not permitted to do so because of the exercise of a constitutional right - especially a right guaranteed by the First Amendment. See Mt. Healthy City School Dist. v. Doyle , 429 U.S. 274, at 283-284, 97 S.Ct. 568, at 574, 50 L.Ed.2d 471 (1977).

b. Fourteenth Amendment

Clear precedent from the Supreme Court of the United States would give the appellant a right to an adversary type of proceeding just before or immediately after the sheriff stopped honoring the appellant's bail bonds. This right exists because appellant had an established privilege which he had been using for many years, e.g. Goldburg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Plenary consideration should be given to correct all these violations of rights protected by the First and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, this case should be reviewed by the Supreme Court.

Respectfully submitted,

Patricia Small Burroughs
Counsel of Record for
Appellant